



**OFFICE OF
THE ATTORNEY GENERAL
AUSTIN, TEXAS**

PRICE DANIEL
ATTORNEY GENERAL

August 13, 1947

Major General K. L. Berry
The Adjutant General of Texas
Austin, Texas

Opinion No. V-336

Re: Eligibility of accounting and custodial clerks in the office of the U. S. Property and Disbursing Officer for Texas to benefits under the Employees Retirement System of Texas.

Dear Sir:

Your request for an opinion on the above subject is as follows:

"H. B. 168, Fiftieth Legislature of Texas, provides for certain retirement benefits, State employees. Paragraph 1, Circular No. 4, 7 May 1946, office of the Chief, National Guard Bureau authorizes the Adjutant General of the State to employ and/or discharge civilian accounting clerks to assist the U. S. Property and Disbursing Officers in the performance of their duties. Paragraph 6 of the same circular authorizes the Adjutant General to determine the rate of pay of the above mentioned accounting clerks within limitations. Paragraph 7 of this circular authorizes the State Adjutant General to determine the hours of work of the accounting clerks thus employed, and specifies that said hours of work will not be less than those set for other employees of the State engaged in similar work.

"Although the subject accounting clerks are paid from Federal funds, they are in effect State employees, since they are employed by the Adjutant General, who sets their rate of pay, and determines the

number of hours they shall work. The Adjutant General also may discharge said employees. In view of this your opinion is requested on the following question:

"Are accounting and custodial clerks employed in the office of the U. S. Property and Disbursing Officer for Texas, under the provisions of N. G. B. Circular No. 4, 7 May 1946, subject to the provisions of H. B. 168, Fiftieth Legislature of Texas, and are they eligible for retirement under said bill?

"If the opinion of the Attorney General on this question is not in the affirmative, then information is desired as to whether subject employees can become eligible for retirement, under the provisions of H. B. 168, while they are performing services for the State of Texas, and receiving their pay from Federal funds."

The eligibility of the described employees depends solely upon whether they are within the contemplation of House Bill No. 168.

From examination of the complete Act, we conclude that such employees are not contemplated by the Act.

The "membership annuity" defined in Subsection Q of Section 1, which is one of the elements of the benefits provided for, is made up of "reserve funds contributed by a member and an equal amount of reserve funds contributed by the State."

While the State might contribute to such a reserve fund on a basis of some percentage of the amount paid such employees by the Federal Government, the Act does not so contemplate. Subsection A of Section 8 provides that "all contributions made by the State shall be from and charged to the respective funds appropriated, allocated, and provided to pay the salary or compensation of the employee for whose benefit the contribution is made." The fund created by contributions by the State of Texas as part of the total funds of the System is called the "State Membership Accumulation Fund." Contributions by the State as set

out in Subparagraph a of Paragraph 2 of Subsection A of Section 8 is under a plan whereby the State contributes funds necessary to make up its allocate portion of the funds available for benefits to members. The mechanics for collection of the State's contributions is contained in Paragraph 2 of Subsection B of Section 8 which contemplates at the outset that funds appropriated to the payment of salaries shall be re-appropriated to the extent necessary to make up the initial contribution by the State. This procedure is carried out by certification by the State Board of Trustees for the Retirement System to the State Comptroller of Public Accounts and the State Treasurer of the total compensation paid to members and upon which the necessary amounts are computed and transferred by the Comptroller to the State Employees Retirement Fund from the respective funds appropriated to departments. Thereafter, similar certifications are made before each session of the Legislature in order that proper appropriations may be made. Obviously from the above, it appears that this law could not be complied with in respect to the employees named in your inquiry, if for no other reason than that the initial contributions by the State are taken from appropriations by the State Legislature setting up the normal funds for the payment of employees of the State. The employees about which you inquire are not paid from State appropriations, and therefore, no machinery is provided for a contribution by the State in their behalf.

Further evidence of the fact that such employees as you inquire about are not contemplated by the Act, is disclosed by the method provided for effecting the employee's contribution to the fund. Subparagraph a of Paragraph 1 of Subsection B of Section 8 dealing with the collection of member's contributions prescribes that "each department of the State shall cause to be deducted on each and every pay roll of a member for each and every pay roll period beginning on the date of the establishment of the membership and full operation of the Retirement System the contributions payable by such member, as provided in this Act . . ." Subparagraph b makes further provisions dealing with payroll deductions. The provisions of the Act further provide that payroll deductions and membership shall be automatic. Obviously, the State of Texas is in no position to enforce nor to effect payroll deductions from a Federal payroll.

Therefore, under the circumstances outlined in your letter, it is the opinion of this department that such accounting clerks are not contemplated by House Bill No. 168.

As to your final inquiry and request for information as to whether such employees can become eligible for retirement, we have read the entire Act and find no provision for the acceptance of members other than those employed and paid by the State. We might suggest that should the funds from which such employees are paid be contributed directly to the State from the Federal Government and thereafter appropriated by legislative enactment for the payment of the salaries of such persons as employees of the Adjutant General's Department, all subject of course to enabling legislation by the Texas Legislature, such employees might be eligible. However, these are matters for the Legislature and the appropriate Federal authority.

SUMMARY

Accounting clerks employed, supervised and subject to discharge by the Adjutant General of Texas, and whose rate of pay is set by him, under authority of the United States Government, whose salaries are paid to them by the United States Government, are not within the provisions nor eligible for benefits of the law creating the "Employees Retirement System of Texas."

Yours very truly

ATTORNEY GENERAL OF TEXAS

By



Ned McDaniel
Assistant

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APPROVED:



PRICE DANIEL
ATTORNEY GENERAL.